

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of	)	
	)	
Communications Services for the Deaf	)	
Petition for Limited Waiver and Request	)	
For Expedited Relief Regarding the	)	CC Docket No. 98-67
Provision of Video Relay Services (VRS)	)	
For Depositions and Other Legal	)	
Proceedings	)	
	)	

***COMMENTS IN SUPPORT OF LIMITED WAIVER REQUEST***

Hands On Video Relay Service, Inc. (“HOVRS” or “Hands On”), by counsel and pursuant to the Commission’s August 13, 2003 Public Notice, DA 03-2644, submits its Comments on Communications Services for the Deaf (“CSD”) June 12, 2003 request for limited waiver and other relief related to use of Video Relay Service (“VRS”) in the course of certain legal and investigative proceedings. In support, the following is shown.

**I. Introduction and statement of the problem.**

Hands On agrees with the concerns expressed by CSD and supports the relief requested. Currently, Telecommunications Relay Service (“TRS”) providers are required, with few exceptions not applicable here, to accept all calls regardless of content or place of origination. Generally, the type of call received is a traditional person-to-person telephone call. Traditional calls may have legal content, such as routine calls between an attorney and client or even an attorney attending pre-trial proceedings via speakerphone. These calls are plainly within the scope of TRS. However, at times courts or law enforcement agencies may seek to use VRS as a substitute for providing an interpreter for a legal proceeding or in an investigative setting.<sup>1</sup>

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<sup>1</sup> These comments use the term court and legal interpreting to include any setting in court, and prosecutorial settings such as law enforcement investigations, grand jury proceedings, prosecutor-witness conferences, identification

Courts may choose this route for considerations of economy and efficiency; however, it poses serious issues for interpreting and for the VRS user. As discussed herein, it is inappropriate to use VRS for legal and court interpreting for several reasons. First, a legal proceeding is not the “type of call” that is normally provided by a common carrier.<sup>2</sup> See 47 C.F.R. §64.604(3). Second, legal and court interpreting involves an additional level of skill, training, knowledge and duties for the sign language interpreter not normally present in the traditional interpreted VRS call. Third, evidentiary rules require the interpreter to take an active role in the proceeding prior to interpreting, contrary to VRS rules. Fourth, ethical mandates place substantial requirements on interpreters to prepare for interpreting and to constantly monitor and ensure the interpretation stays accurate. At times, this involves the interpreter taking an active role in the proceeding, again contrary to VRS rules. Finally, states regulate the credentials of interpreters who are permitted to work in their court and legal settings. Each of these issues will be discussed in turn.

## **II. Definitions.**

### **A. Court interpreter.**

A court interpreter is an officer of the court who is duty-bound to provide an accurate and ethical interpretation that protects the integrity of the record and the proceedings.<sup>3</sup> The court interpreter owes a duty of loyalty to the court. When the interpreter is aware of any event that would compromise the integrity of the proceedings and is aware of that event due to the

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settings (line ups), and other settings that are typically included in state statutory provisions regulating the use of interpreters.

<sup>2</sup> Though ATT provides a language line for spoken language calls, the system is not without controversy. AT&T admits that the interpreters it uses are not screened, trained, tested or necessarily qualified for legal or court interpreting.

<sup>3</sup> The interpreter is an officer of the court. See e.g., *State v. Gonzales-Morales*, 979 P.2d 826 (Wash. 1999). The National Center for State Courts’ Code of Professional Responsibility for Interpreters in the Judiciary states in the Preamble, “[a]s officers of the court, interpreters help assure that [non-English speaking persons] enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively.” Canon 3

interpreter's language or cultural skills, the interpreter has an obligation to bring the event to the attention of the court. Under the current FCC regulation, the VRS interpreter acting as a court interpreter is prohibited from fulfilling this function. Hence, the "officer of the court" role places affirmative duties on the interpreter that are inconsistent with the provision of services via VRS.

**B. Communications assistant.**

A Communications Assistant ("CA") is defined by 47 CFR § 64.601(5) as "a person who transliterates or interprets conversation between two end users of TRS." A qualified interpreter is "an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary." *Id.* at 47 CFR § 64.601(13). Though these two definitions are included in the concept of a court or legal interpreter, the court or legal interpreter has additional duties, training and skill requirements. Primarily, the court and legal interpreter must be trained in and fully aware of the legal issues surrounding a mediated communication event.

**C. Court or legal interpreting.**

Legal interpreting is not limited to court interpreting. Court interpreting is generally defined as the interpretation of an on the record legal proceeding. Court interpreting includes interpreting in depositions. Legal interpreting includes, among other things, interpreting attorney-client conferences, witness preparation, court ordered programs, mediations, attorney-directed investigations, law enforcement interpreting, and grand jury work.

**D. TRS/VRS.**

TRS provides an effective mechanism to permit callers – who were previously excluded – access to the telephone, making their experience functionally equivalent to other traditional

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further explains, "[t]he interpreter serves as an officer of the court, and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant." *Id.*

telephone users. For this purpose, the Commission issued guidelines designed to make the system equally effective as the telephone system is for other users. Significantly, TRS is to be used for traditional telephone communications that are considered of the “type of call normally provided by common carriers.” 47 C.F.R. §64.604(3). Legal events such as depositions, law enforcement interrogations, grand jury proceedings, witness conferences, arraignments, status hearings, trials, bail review hearings and sentencing hearings simply are not the type of call normally provided by common carriers. Indeed, use of VRS in these proceedings, where all parties are present, would appear to transform VRS into Video Remote Interpreting (“VRI”).

The Commission has consistently held that VRI is not VRS. Essentially, if the parties are in the same location, there is no need for a VRS call. An on-site interpreter or VRI would be called for. For this reason, the CSD petition should be granted. Nevertheless, a myriad of additional reasons exist to proscribe VRS in a courtroom or other legal proceeding setting. However, due to the dearth of qualified legal interpreters, the relative infrequent use of sign language interpreters *vis a vis* other non-interpreted proceedings and perhaps due to cost considerations, courts and lawyers have increasingly looked to VRS as an inexpensive method of obtaining sign language interpreting services. Unfortunately, the role of the legal interpreter is particularly inconsistent with the use of VRS to interpret legal proceedings.

### **III. Legal issues.**

Again, HOVRS agrees and supports the CSD’s comments in its Petition. The following discussion is intended to supplement those comments.

#### **A. Oath and *voir dire*.**

Most states have adopted or modeled their evidentiary rules on the Federal Rules of Evidence (“FRE”). Those rules govern the conduct of trials and the introduction of testimony and

evidence. Several key evidentiary provisions for introducing reliable and trustworthy testimony are compromised by 47 C.F.R. §64.604(2). The FRE defines a qualified interpreter as one who is 1) subject to testifying as an expert with respect to their skills, education, training and abilities, and 2) subject to the requirement to take an oath to interpret accurately.<sup>4</sup> At the beginning of a legal proceeding, the interpreter must swear to interpret accurately and faithfully all of the proceedings. The interpreter must affirmatively declare his or her ability to abide by this oath. The interpreter's failure to take the oath during the proceedings has been the basis of more than one appeal in interpreted cases.<sup>5</sup> Section 64.604(2) requires the interpreter to refuse to comply with the FRE.

The interpreter must also take the stand and testify as an expert prior to being sworn as the official interpreter.<sup>6</sup> The federal rule on experts states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FRE 702. The practical effect is that before the expert testifies, he or she must take the stand and be subject to *voir dire* regarding his or her knowledge, skills, experience and training. If the court finds the expert to be qualified, then the expert may give an opinion. With respect to court interpreters, the practical

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<sup>4</sup> FRE 604 states, "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation." FRE 603 states, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." The interpreter must, under FRE 604, swear on the record that the interpretation will be accurate and complete.

<sup>5</sup> See e.g. *People v. Bicet*, 580 N.Y.S. 2d. 55, app. denied (N.Y.A.D. 2 Dept., 1992); *United States v. Kramer*, 741 F.Supp. 893 (S.D. Fla. 1990).

<sup>6</sup> The *voir dire* is a critical part of determining the acceptability of a court interpreter: to such an extent that the National Registry of Interpreters for the Deaf tests the interpreter's ability to competently portray herself or himself during *voir dire* on the Legal Specialist Certification test. Additionally, interpreters have an ethical obligation to represent themselves honestly while court interpreting. See NCSC Model Code.

effect is that the interpreter must take the stand and testify with respect to his or her knowledge, skills, experience and training prior to being sworn to interpret the proceeding. That is not a prudent procedure for a VRS call.

Furthermore, court interpreters function under an exacting code of professional conduct that requires them to make certain “on the record” disclosures under certain circumstances. At the time the oath is administered, the interpreter is ethically obligated to disclose to the court any prior knowledge of the parties involved and permit the court to make a determination as to whether that knowledge would constitute a conflict of interest for the court interpreter. Most states use some form of the model code of professional conduct for court interpreters promulgated by the National Center for State Courts (“NCSC”). The NCSC code, Canon 3 states “[I]nterpreters shall disclose any real or perceived conflict of interest.” The commentary to the code clarifies that “[b]efore providing services in a matter, court interpreters must disclose to all parties and presiding officials any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest.” *Id.* Under the current FCC regulations, the VRS interpreter acting as a court interpreter (and these provisions apply with equal force in a deposition which by definition is sworn witness testimony) is precluded from complying with these ethical mandates, however.

## **B. Evidence.**

### **1. Confidentiality.**

Currently, CAs are “prohibited from disclosing the content of any relayed conversation regardless of content. . . .”<sup>7</sup> 47 C.F.R. §64.604(2). As laudable and as important as this

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<sup>7</sup> The regulations do expressly indicate that no records will be kept even if inconsistent with state law. However it is unlikely that at the time the regulations were written, the drafters expressly considered the impact that this particular provision would have on the efficiency of legal proceedings.

requirement is for the typical interpreted telephone call, it places an impenetrable barrier to the presentation of evidence in court.

## **2. Hearsay.**

Generally, one party cannot come into court and present evidence that was told to them by someone else. The long-standing evidentiary rule in every jurisdiction is that one must have personal knowledge of an event to relate it in court. In the interpreted context, the consumers do not have personal knowledge of the actual communication except as mediated through the interpreter. The parties cannot therefore relate the conversation in court. In an interpreted conversation, only the interpreter has personal knowledge of both sides of the conversation. For the parties to present the information personally, the interpreter must first testify.

Most frequently, this evidentiary rule is called into play in the law enforcement setting. If a deaf person is arrested, given the Miranda warnings and questioned, he or she cannot be forced to take the stand later at trial and repeat any of the conversation with the police because of the Fifth Amendment's protections against self-incrimination. The officer, however, does not have personal knowledge of sign language and cannot relate what the deaf person said until the conversation is authenticated by the interpreter who is generally seen, if qualified, as the deaf person and the officer's joint agent. Furthermore, the defendant in a criminal trial has a right to attempt to discredit the interpreter by showing lack of skill or bias and should not be considered a joint agent in order to prevent the officer from testifying. If an interpreter is present (whether VRS mediated or not), attorneys are trained to focus on the use of the interpreter to obtain a confession as a major part of a suppression motion strategy. Section 64.604(2) as written nullifies this important evidentiary feature of trial procedure.

### **3. Authentication.**

As stated, at times in a legal proceeding an interpreter must testify with respect to a prior interpreted event. If the interpreter does not testify, the party is precluded from introducing any evidence by anyone else of the interpreted event. FRE 901 states, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” In the interpreted context, before one of the parties may be called to testify regarding an interpreted conversation, the interpreter must take the stand and authenticate the interaction by testifying that he or she was the interpreter for the conversation and that he or she interpreted the conversation accurately. In the absence of this testimony, the other party’s relation of the interpreted conversation is prohibited under the hearsay rules.

### **4. Subpoenae.**

An interpreter who is subpoenaed to testify in court is placed in a precarious position by the current regulations. A subpoena is a court order. The CA who is properly subpoenaed has only three choices. He or she may comply with the subpoena and be in violation of the federal regulations. He or she may hire an attorney and prepare a motion to quash the subpoena spending personal resources unnecessarily. Finally, he or she may ignore the court order and face being held in contempt of court. None of these choices are palatable for the CA.

### **C. State statutory requirements.**

Finally, “TRS providers are responsible for requiring that VRS CAs are qualified interpreters.” *Id.* Many states have statutes that define a qualified interpreter for a legal setting. The legal setting includes not only in-court proceedings, but frequently the statutes incorporate the investigative setting and define the credentials that an interpreter must possess in order to



work with law enforcement or other investigative settings. As explained in the CSD Petition, these statutes place VRS interpreters in a position in which they are or may be violating state statutes by processing a purported VRS call in the contexts discussed herein. In other words, calls originating in a state with a specific certification requirement to work in state courts such as California, Kansas or Texas must be processed by interpreters who meet those state statutory requirements. It is doubtful whether any VRS provider could comply with each state's legal interpreting statute, twenty-four hours a day, seven days a week without driving the cost of VRS up substantially.

#### **D. Waiver.**

Waiver of the right to a state certified interpreter is not an effective resolution because generally waivers must be taken through a fully qualified interpreter (holding the state certification) or they are subject to challenge on voluntariness and due process grounds.<sup>8</sup>

#### **IV. Protocol issues.**

In addition to the ethical provisions discussed earlier, there are other ethical tenets that the FCC regulations currently affect.<sup>9</sup> In particular Canons 7 and 8 of the NCSC model code dictate that interpreters be vigilant in ensuring that their interpretation continues to be accurate throughout the proceedings. The commentary to Canon 7 states,

Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently.

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<sup>8</sup> See 28 U.S.C. §1827(f)(1); D.C. Code Title 31, Chapter 27 §1-2.

<sup>9</sup> Other canons are tangentially implicated; for example, Canon 4 requires that the interpreter remain as unobtrusive as possible. This is difficult anytime technology is used in the courtroom.

The FRE also requires that these conversations be taken outside of the presence of the jury.<sup>10</sup> Typically, the interpreter would ask to approach the bench in order for the communication to be conducted outside the jury's presence. This would be difficult for the VRS interpreter to do.

Canon 8 requires interpreters to notify the court of any problem or issue that "impedes or hinders their ability to deliver interpreting services adequately." Canon 8 is also the source of the interpreter's ethical obligation to prepare with the parties. The interpreter prepares not only to be able to provide a more accurate interpretation but also to discern whether the matter presents any conflicts of interest that must be disclosed to the court. Preparation involves reviewing each party's case file, speaking with the attorneys, and with the deaf person. Interpreters are even required under the model code to stop mid-proceeding to prepare if an unanticipated issue arises.<sup>11</sup>

The FCC regulations require the interpreter to breach these provisions. Further, this Canon may be violated more frequently with VRS interpreting than with live interpreting. Technological issues, such as a poor telephone connection, with respect to VRS interpreting may make it difficult for CAs to provide an accurate interpretation. Accuracy is always important but in court and legal interpreting, where accuracy is absolutely critical for the interpreter to abide by the oath, inaccurate interpretations can have a devastating impact.

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<sup>10</sup> FRE 103(c) states, "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

<sup>11</sup> The commentary to Canon 8 states "[e]ven competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical or specialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness)." "When such instances occur, interpreters should request a brief

**V. Conclusion.**

As is apparent, the rules related to court and legal proceedings are complex. TRS providers are responsible for ensuring that the CAs who are hired are sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities. *Id.* at 47 CFR § 64.604(1). An interpreter who interprets in legal settings must be a highly skilled and specially trained individual who recognizes that the legal setting places additional duties on an interpreter not present in other settings. The interpreter must understand the duties and have the ability to carry out their duties unrestrained from the limitations imposed by the current system.

Respectfully submitted,

**HANDS ON VIDEO RELAY SERVICES, INC.**

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recess to familiarize themselves with the subject matter. ... If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding officer.”

### *Certificate of Service*

I, Funmi Feyide, do hereby certify that copies of the Comments on Limited Petition for Waiver were sent on this 15th day of September, 2003, via first-class mail, except where noted, postage pre-paid, to the following:

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